KENT M. ROGER, State Bar No. 95987
REBECCA A. FALK, State Bar No. 226798
MICHELLE M. KIM, State Bar No. 252901
CHRISTINE S. SAFRENO, State Bar No. 251970
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, CA 94105-1126
Tel: 415.442.1000
Fax: 415.442.1001
E-mail: kroger@morganlewis.com

Attorneys for Defendants
HITACHI, LTD., HITACHI DISPLAYS, LTD., and
HITACHI ELECTRONIC DEVICES (USA), LTD.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,

This Document Relates To:

ALL ACTIONS

No. M: 07-1827 SI
MDL No. 1827

HITACHI, LTD., HITACHI DISPLAYS, LTD., AND HITACHI ELECTRONIC DEVICES (USA), LTD.'S REPLY TO (1) DIRECT PURCHASER PLAINTIFFS' AND (2) INDIRECT PURCHASER PLAINTIFFS' OPPOSITIONS TO DEFENDANTS' JOINT AND SEPARATE MOTIONS TO DISMISS

Date: April 30, 2008
Time: 2:00 p.m.
Dept.: Courtroom 10, 19th Floor
Judge: Honorable Susan Illston

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

I. INTRODUCTION

This reply incorporates by reference the Defendants' Joint Reply to Direct Purchaser Plaintiffs' Opposition and Joint Reply to Indirect Purchaser Plaintiffs' Opposition (collectively "Joint Replies").

Contrary to Direct Purchaser Plaintiffs' ("Direct Plaintiffs") and Indirect Purchaser Plaintiffs' ("Indirect Plaintiffs") mischaracterization of the Hitachi defendants' supplemental motions to dismiss, the fact remains that both the Direct Purchaser Plaintiffs' Consolidated Complaint ("DP-CC") and Indirect Purchaser Plaintiffs' Consolidated Amended Complaint ("IP-CAC") (collectively "Complaints"), with their handfuls of stray mentions of "Hitachi," are each wholly insufficient to state a conspiracy claim against any of the Hitachi defendants and fail to provide any of the Hitachi defendants with fair notice of the grounds for such a claim. Under the most recent Ninth Circuit authority interpreting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007), Rule 8(a)(2)'s "notice pleading" rule was abrogated by *Twombly* for purposes of adequate pleading in antitrust cases. *Kendall v. Visa U.S.A., Inc.*, 2008 WL 613924, at *8 n.5 (9th Cir. Mar. 7, 2008). In such cases, the Complaints must "plead the necessary *evidentiary* facts to support [their] conclusions." *Id.* at *3 (emphasis added).

While both Oppositions fixate on an idea that the allegations in the Complaints need not be detailed "defendant-by-defendant," they ignore the predicate requirement that the Complaints plausibly allege in the first instance both a conspiracy *and* that each of the Hitachi defendants joined in the conspiracy. The Complaints rely solely on general, conclusory allegations against "all Defendants" or "all Japanese defendants," and in so doing, fail to state facts sufficient to allege the existence of an agreement (essential to a conspiracy claim), or *even* parallel conduct. Moreover, the Complaints fail to allege that any of the Hitachi defendants joined and participated in any conspiracy. Accordingly, the Hitachi defendants' motions to dismiss should be granted.

II. STATEMENT OF FACTS

A. DP-CC

As noted in the Hitachi defendants' motion ("Hitachi Direct Motion"), Hitachi, Ltd., Hitachi Displays, Ltd., and Hitachi Electronic Devices (USA), Ltd. are each separate and distinct

legal entities. By mere *ipse dixit*, however, the DP-CC bundles them together as "Hitachi."

But the DP-CC includes only a handful of references even to the artificial composite "Hitachi":

- early presence in the TFT-LCD industry (even while acknowledging that Hitachi Displays, Ltd. did not exist prior to 2002);
- supposed quarterly average price relating to a single end TFT-LCD *product*;
- small number of business relationships with other entities; and
- participation in a single trade association.

DP-CC ¶¶ 39, 92-93, 102, 130, 159, 162, 164; *see* Hitachi Direct Motion, Section II.

B. IP-CAC

The IP-CAC also bundles together Hitachi, Ltd., Hitachi Displays, Ltd., and Hitachi Electronic Devices (USA), Ltd. as "Hitachi." IP-CAC ¶¶ 85-87, 89.

Specifically regarding the artificial composite "Hitachi," the IP-CAC includes a handful of statements relating only to business relationships of nonspecified Hitachi defendants. IP-CAC ¶¶ 120,122, 126, 156; *see* Hitachi Indirect Motion, Section II.

III. ARGUMENT

A. The Complaints Fail To Plead Facts Sufficient To State A Plausible Claim Of The Existence Of An Antitrust Conspiracy *And* Participation By Any Of The Hitachi Defendants In Such A Conspiracy.

"[T]o satisfy pleading requirements in the antitrust context, the plaintiffs must allege that *each individual defendant* joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement *and* a conscious decision by *each defendant* to join it." *In re Elec. Carbon Prods. Antitrust Litig.*, 333 F. Supp. 2d 303, 311-12 (D.N.J. 2004) (citing *Jung v. Assoc. of Am. Med. Colls.*, 300 F. Supp. 2d 119, 163-64 (D.D.C. 2004)) (internal quotation marks omitted) (emphasis added). "Simply using the global term 'defendants' to apply to numerous parties without any specific allegations that would tie each particular defendant to the conspiracy is not sufficient." *Id.* at 312 (internal quotation marks omitted) (noting, however, that the court may deny a motion to dismiss *if* it can fairly draw inferences from the alleged conspirators' behavior indicating that they participated in a conspiracy).

The Complaints must allege enough facts to put each of the Hitachi defendants on notice of the grounds for relief against it. Plaintiffs are required to provide the bases of their entitlement to relief, beyond "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 127 S. Ct. at 1965.

In their Oppositions, both sets of Plaintiffs skip over the threshold failures of their respective Complaints even to sufficiently allege the existence of, and the Hitachi defendants' participation in, a conspiracy in the first instance. Instead, they seek to divert attention to a straw man, inaccurately attributing to the Hitachi defendants a supposed insistence to proceed "defendant-by-defendant."

The Hitachi defendants do not contend that the Complaints must be compartmentalized, nor do they ask the Court to examine the claims against them separately from the rest of the allegations in the Complaints. Rather, the Hitachi defendants' motions points out the Complaints' failures to allege facts sufficient to state that any of the Hitachi defendants "joined the conspiracy and played some role in it." *In re OSB Antitrust Litig.*, 2007 WL 2253419, at *5 (E.D.Pa. Aug. 3, 2007). Plaintiffs' general allegations as to all Defendants or all Japanese defendants, and the Complaints' handful of allegations as to "Hitachi" fail to establish a plausible conspiracy claim and further fail to put any of the Hitachi entities on notice of the grounds for relief against them in either Complaint. Here, as in the *Jung* case:

> [P]laintiffs' use of the term "defendants" to refer to multiple defendants situated very differently from one another in the context of general and global allegations is insufficient . . . Plaintiffs cannot escape their burden of alleging that each defendant participated in or agreed to join the conspiracy by using the term "defendants" to apply to numerous parties without any specific allegations as to [the Hitachi defendants].

Jung, 300 F. Supp. 2d at 163. The Ninth Circuit held less than a month ago that "[t]erms like 'conspiracy, or even 'agreement' . . . might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement . . . but a court is not required to accept such terms as a sufficient basis for a complaint" in a Section 1 conspiracy case. *Kendall*, 2008

WL 613924, at *3 (internal quotation marks and citation omitted). Instead, the *Kendall* Court held that under *Twombly*, plaintiffs must "plead the necessary *evidentiary* facts to support their conclusions." *Id.* (emphasis added). Ultimately, "the complaint[s] do[] not answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id.* at *4. Neither the DP-CC nor the IP-CAC plead any evidentiary facts that come close to meeting the required standard.

Plaintiffs seek to blur the distinction between the sufficiency of allegations to state a conspiracy claim at all, and the sufficiency of allegations of acts for which specific defendants may be liable, *after* a conspiracy and participation are first alleged. To that end, Direct Plaintiffs rely on a number of inapposite cases decided long before *Twombly*, holding that the DP-CC need not allege overt acts by each individual defendant. Direct Opp. 23:16-28; 24:1-8. In their reliance on these cases, Direct Plaintiffs ignore the threshold failure of the DP-CC even to sufficiently allege the existence of, and any of the Hitachi defendants' participation in, a conspiracy, as required by *Twombly*. *See* 127 S. Ct. at 1966-67. But even these cases lend Plaintiffs no support. These cases discuss the standard for proof of a conspiracy on motions for *summary judgment* and possible vicarious liability only after a showing that a party joined and participated in a conspiracy. They hold only that *if* a complaint successfully alleges a conspiracy *and* alleges that an individual defendant participated in the conspiracy, *then* it need not allege overt acts by each individual defendant in order for such defendants to be linked to the alleged conspiracy. *See, e.g.*, *In re Bulk Popcorn Antitrust Litig.*, 783 F. Supp. 1194, 1197 (D. Minn. 1991) ("*Once* a conspiracy is shown, only slight evidence is needed to link another defendant with it.") (emphasis added); *Beltz Travel Serv. v. Int'l Air Travel Ass'n*, 620 F. 2d 1360, 1367 (9th Cir. 1980) ("*If* Beltz can establish the existence of a conspiracy . . . and that appellees were a part of such a conspiracy, appellees will be liable . . . .") (emphasis added).

Similarly, the Indirect Plaintiffs assert that the Hitachi defendants' motion should be denied because pleading particular acts by each defendant in a conspiracy is not required. Indirect Opp. at 9:22-23. In support of their argument, Indirect Plaintiffs misuse the *SRAM* Court's Order of February 14, 2008. Indirect Opp. at 10: 2-4. First, the *SRAM* Order predates

Kendall, the latest and governing law in the Ninth Circuit. Second, in actuality, the *SRAM* Court's statement supports the Hitachi defendants' position. In *SRAM*, the Court noted that at the motion to dismiss stage, the complaint requires "allegations that plausibly suggest that *each Defendant* participated in the alleged conspiracy." *In re Static Access Memory Antitrust Litig.*, 2008 WL 426522, at *6 (N.D. Cal. Feb. 14, 2008) (emphasis added).

B. The DP-CC Lacks Sufficient Facts Even To Allege Parallel Conduct; Nor Could It Survive On Such Allegations Alone.

Direct Plaintiffs claim that the DP-CC alleges parallel conduct together with factual context showing that parallel conduct results from concerted action. Direct Opp. 2:3-4. But the DP-CC's specific allegations are in fact, a far cry from raising even parallel conduct. Plaintiffs not only lump all Hitachi entities together, they claim that the DP-CC's allegations as to all "Defendants" or all "Japanese defendants," apply equally to this nonexistent composite entity even while acknowledging that Hitachi Displays, Ltd. was not formed until 2002.[1] Even if the DP-CC had alleged parallel conduct as to each Hitachi defendant, "[a] statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a §1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. *Kendall*, 2008 WL 613924, at *4 (quoting *Twombly*, 127 S. Ct. at 1966).

1. **Formation of IPS Alpha Technology, Ltd. ("IPS Alpha")**

Direct Plaintiffs' Opposition attempts to do what the DP-CC itself neglects to do, asserting that the DP-CC states IPS Alpha was created in 2005 as a joint venture, *consistent with a supposed strategy to curtail supply*. Direct Opp. 26:12-13. For this, Plaintiffs cite paragraph 60 of the DP-CC, which states only that IPS Alpha was formed to "to manufacture and sell TFT-LCD panels for televisions." Without any evidence of a collusive agreement, IPS Alpha's mere formation for a concededly legitimate business purpose, does not and cannot support a conspiracy

[1] Plaintiffs cite authority for the proposition that a later co-conspirator can be liable for earlier conspiratorial acts. Direct Opp. at 26 n.10. But the DP-CC itself says nothing about how Hitachi, Displays, Ltd. actually joined a conspiracy after its formation or participated in one.

claim. *See Kendall*, 2008 WL 613924, at *5 ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.") (citing *Twombly*, 127 S. Ct. at 1964-66 & n.5); *see also Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 579 n.30 (S.D.N.Y. 2007) (discussing allegations against joint ventures and stating that "it is well settled that the mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred.") (internal quotation marks and citations omitted).

Plaintiffs again blithely lump defendants together in the apparent hope that their sweeping conclusions as to all will somehow adhere to each individual defendant. This time, they conflate both "Hitachi" and "Toshiba," and IPS Alpha, merely on the basis of the initial joint venture formation. By the DP-CC's own concession, only Hitachi Displays, Ltd. – not Hitachi, Ltd. or Hitachi Electronic Devices (USA), Ltd. is a joint venturer in IPS Alpha. *See* DP-CC ¶ 60.[2] Moreover, even as Direct Plaintiffs conflate these separate companies and groups of companies, the Indirect Plaintiffs have agreed and the Court has ordered that IPS Alpha is *not* a "Hitachi" defendant. *See* Stipulation and Order, Dkt. #488 (striking all references to Hitachi America, Ltd. and removing IPS Alpha from the collective reference to "Hitachi").

Direct Plaintiffs' Opposition claims that it is plausible to infer that the formation of IPS Alpha was itself a conspiratorial act, but the DP-CC pleading itself provides insufficient factual context to support such a claim of plausibility. The DP-CC concludes that the formation of IPS Alpha in 2005 was part of the TFT-LCD Products industry's "significant consolidation" and that "[s]ome industry participants went as far as overtly suggesting that the industry should seek to curtail supply through mergers. These suggestions were carried out." DP-CC ¶¶ 92, 135. The DP-CC is devoid, however, of facts alleging *who* made such "overt" suggestions to curtail supply through mergers, *when*, *where*, and *how*. *See Kendall*, 2008 WL 613924, at *4. Nor does it elaborate at all on how mergers were in fact employed to curtail supply, or how IPS Alpha in

[2] The same shortcoming applies to the allegations against defendants Toshiba America Electronics Components, Inc. and Toshiba America Information Systems, Inc., neither of which are even alleged to be joint venturers in IPS Alpha.

particular was used by any of the Hitachi defendants to join and participate in a conspiracy. The DP-CC admits that IPS Alpha was formed only in 2005, at least two years after the supposed "call[] for the industry to merge," and its already insufficient allegations are all the more untenable as against Hitachi, Ltd. and Hitachi Electronic Devices (USA), Ltd., which are not even named as, and are not, members of the joint venture. Direct Opp. at 26:10-11; DP-CC ¶ 135.

Additionally, even if IPS Alpha's formation can be inferred to be an instance of market concentration, allegations of market concentration are insufficient to render a conspiracy claim plausible as against any of the Hitachi defendants. *See In re Late Fee and Over-Limit Fee Litig.*, 2007 WL 4106353, at *8-*10 (N.D. Cal. Nov. 16, 2007) ("plus factors" such as opportunities to communicate and market concentration, "whether taken singly or together, are insufficient to plead a case."). Although Plaintiffs contend that "the mere formation of a corporate entity whose purpose is to create a combination in restraint of trade can itself be a violation," they again ignore the fact that, as a threshold matter, there are no facts in the DP-CC plausibly alleging that IPS Alpha *was* formed with such a conspiratorial *purpose*.

2. **Membership in Trade Associations**

The DP-CC alleges nothing more than "Hitachi's" membership in *one* trade association ("SEAJ") and "presentations" by unnamed "Hitachi" officials on LCD *technology* at a *single* conference as support for its allegation that each of the Hitachi defendants participated in a worldwide price-fixing conspiracy. DP-CC ¶ 159, 162, 164. In fact, Plaintiffs' own documents purporting to be the source for the DP-CC's allegations and produced pursuant to this Court's Stay Order, reveal that the only Hitachi entities that are members of SEAJ are *not any of the Hitachi defendants in this case*. As such, the DP-CC's trade association allegation is not even asserted against any Hitachi defendant.[3] The assertion in the Opposition that the DP-CC "alleges

[3] Pursuant to paragraph 2 of the Court's Order Granting United States' Motion To Stay Discovery (Dkt. #300), Plaintiffs were ordered to produce "all documents referred to in the plaintiff's complaint." One of the documents produced by the Direct Plaintiffs listed the members of SEAJ. They listed the following Hitachi entities not named as Defendants in this case: Hitachi Kokusai Electric, Inc., Hitachi High Technologies Corporation, Hitachi Metals, Ltd., and Hitachi Plant Technologies, Ltd. Because the membership list was produced as a document referred to in the DP-CC, it is proper for the Court to take judicial notice of it. *See*

numerous meetings at which defendants, including specifically, Hitachi . . . had 'opportunities to exchange information or make agreement'" is thus demonstrably erroneous as to any of the Hitachi defendants. In any event, the DP-CC itself fails to state any facts showing how a single event was used by any of the Defendants, least of all by any of the Hitachi defendants, to further a conspiracy, or even more basic – how a single event evidences a conspiracy at all.

3. **Licensing Arrangement**

As noted in the Hitachi defendants' motion, the DP-CC's allegation of a licensing arrangement between "Hitachi" and "Chi Mei" does not support parallel conduct, let alone a conspiracy claim. *Twombly*, 127 S. Ct. at 1971. The DP-CC fails to state any facts supporting that this particular licensing arrangement plausibly supports a conspiracy claim rather than rational, legal business behavior. Likewise, Plaintiffs' allegations of early presence in the TFT-LCD industry by "Hitachi" and supposed quarterly average price relating to a single end product of "Hitachi" plead only neutral commercial conduct.

Without more, association membership of three Hitachi entities not involved in this litigation, conference attendance by unnamed "Hitachi" officials, and a license by a nonexistent "Hitachi" composite, all fully consistent with a legitimate business purpose, do not state a plausible claim against any of the Hitachi defendants. *See Kendall*, 2008 WL 613924, at *3, *5.

C. Indirect Plaintiffs' Opposition Offers No Rebuttal To The Reality That The Sparse Allegations As To The Hitachi Defendants Fail Even To Establish Parallel Conduct, Let Alone A Conspiracy *And* That The Hitachi Defendants Participated In A Conspiracy.

Indirect Plaintiffs' Opposition wholly ignores the insufficiency of the IP-CAC's allegations of consolidation and "opportunities for collusive activity" as to the Hitachi defendants, as pointed out in the Hitachi Motion, at 5-6. The Opposition makes only the general statement that the IP-CAC "details *Defendants'* various information exchanges, . . . agreements resulting from express invitations to collude, . . . and directly resulting price stabilization and increases." Indirect Opp. at 10:10-13 (emphasis added). Even while using the words "express," and

---

Hitachi Defendants' Request for Judicial Notice and Declaration of Kent M. Roger In Support Thereof.

"directly," Plaintiffs do not, either in their Opposition or in the IP-CAC itself, suggest how any of the Hitachi defendants participated in any conspiracy. One searches in vain for evidentiary facts in the IP-CAC itself sufficient to plausibly tie *any* of the Hitachi defendants to a price-fixing conspiracy.

For example, the IP-CAC states merely that "cooperative arrangements . . . create[d] additional opportunities for collusive activity. It then notes that "Chi Mei" has a licensing arrangement with "Hitachi" (without identifying which) and others, and that "Defendant Hitachi has a joint venture with, inter alia, Toshiba called IPS Alpha." IP-CAC ¶ 122. (Again, only Hitachi Displays, Ltd. and Toshiba Corporation are joint venturers in IPS Alpha). The IP-CAC cursorily states that "Hannstar makes panels for Hitachi and Panasonic," once again without identifying which, and without any facts as to how such an arrangement (even assuming it exists), establishes that any Hitachi defendant participated in a conspiracy. *See* IP-CAC ¶ 120; *Kendall*, 2008 WL 613924, at *4 (holding that a defendant's commercial efforts stay in neutral territory, absent any evidence of a "meeting of the minds").

These allegations of mere "plus factors" as to a nonexistent composite "Hitachi" are insufficient to allege parallel conduct on the part of any of the specific Hitachi defendants, let alone plausibly allege that a conspiracy existed *and* that any of the Hitachi defendants actually participated in a conspiracy. *See In re Late Fee*, 2007 WL 4106353, at *8-*10.

IV. CONCLUSION

Plaintiffs cannot escape the fact that they are required to state a claim for relief as to *each specific defendant* but have failed to do so. *Twombly*, 127 S. Ct. at 1965; *Jung*, 300 F. Supp. 2d at 164 n.27. The Complaints' generalized allusions to activities of "Defendants" or "Japanese defendants" can no more shed light on what any of the separate Hitachi defendants are alleged to have done wrong, than can these sparse allegations in which Plaintiffs invoke a nonspecified "Hitachi," making demonstrably inaccurate and internally inconsistent assertions to boot.

For the reasons set forth herein and in their original moving papers, the Hitachi defendants respectfully request that both the DP-CC and IP-CAC be dismissed as to them as a matter of law.

Dated: April 3, 2008

MORGAN, LEWIS & BOCKIUS LLP

By */s/ Kent M. Roger*
Kent M. Roger
Attorneys for Defendants
HITACHI, LTD., HITACHI DISPLAYS, LTD., and HITACHI ELECTRONIC DEVICES (USA), LTD.